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SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

AUG 24 1998

Federal Communications Commission
Office of Secretary

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August 24, 1998

VIA HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
Washington, DC 20554

ORIGINAL

Re: Ex Parte Presentation
CC Docket No. 96-98
CPD 97-30

Dear Ms. Salas:

Pursuant to Sections 1.1206(b)(1) of the Commission's rules, 47 C.F.R. Sections 1.1.206(b)(1), I am providing notice of a written *ex parte* presentation in the above-captioned matters.

On August 24, 1998, the attached letter was delivered to William Kennard, Chairman with copies to Commissioners and staff as indicated in the letter.

Four copies of the letter are enclosed.

Sincerely,



Patrick J. Donovan

cc: Tamara Preiss
Edward Krachmer

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August 24, 1998

VIA HAND DELIVERY

Honorable William E. Kennard, Chairman
Federal Communications Commission
Washington, DC 20554

Re: Ex Parte Presentation

CC Docket No. 96-98
CPD 97-30

Dear Chairman Kennard:

We are writing on behalf of US LEC, Inc. concerning a motion filed by BellSouth Telecommunications, Inc. (BellSouth) requesting that the United States District Court for the Western District of North Carolina refer to the Commission on primary jurisdiction grounds BellSouth's appeal from a decision of the North Carolina Utilities Commission (NCUC). In that decision, the NCUC examined and enforced a voluntarily negotiated interconnection agreement under Section 252 of the Act between US LEC, Inc. and BellSouth. The NCUC determined that under that agreement BellSouth was obligated to pay US LEC reciprocal compensation for calls originating on BellSouth's network that US LEC terminated to US LEC's Internet Service Provider (ISP) customers within US LEC's local calling area. In a blatant attempt at forum shopping, BellSouth now seeks to obtain a different result and/or delay of enforcement of its own agreement by means of a referral to the Commission. We respectfully request that the Commission not support or otherwise encourage BellSouth's efforts in this regard.

Similar disputes concerning reciprocal compensation engendered by incumbent LECs' refusal to comply with their own agreements have been ongoing for nearly two years. In every one of these disputes that have been decided by state commissions or courts, it has been determined that incumbent Local Exchange Carriers (ILECs) must pay Competitive Local Exchange Carriers (CLECs) reciprocal compensation. We believe that it would substantially undermine the orderly resolution of proceedings concerning enforcement of interconnection agreements for these cases at this late date to be suspended or terminated on the basis of a

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August 24, 1998

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primary jurisdiction referral, even if the case were an appropriate one for referral, which this is not.¹

Moreover, Section 252(a)(1) of the Communications Act, 47 U.S.C. § 252(a)(1), provides that incumbent ILECs and CLECs may voluntarily negotiate "binding" interconnection agreements. Voluntarily negotiated agreements are clearly the preferred mechanism under the Act for achieving interconnection agreements, rather than the more cumbersome mediation and arbitration procedures. Thus, BellSouth's motion, if granted, or supported by the Commission, would undercut the policy of the Act by permitting parties to evade the terms of their own voluntarily negotiated agreements.

A referral in this case would also be inappropriate because the Commission does not have primary jurisdiction over the subject matter of this litigation. Far from leaving the Commission primary authority, the Eighth Circuit determined that "state Commissions retain primary authority to enforce the substantive terms of the agreements made pursuant to section 251 and 252."² The court also described the states' authority in this area as "plenary."³ Enforcement of interconnection agreements is exactly what US LEC sought from the NCUC. Thus, at least pending Supreme Court review of *Iowa Utilities Board*, the states, not the FCC, have primary authority in this area. A primary jurisdiction referral to the Commission would be improper as the Commission does not have concurrent jurisdiction with the District Court. In addition, the purpose of a primary jurisdiction referral is for the agency with expertise in technical matters to first address the issues. This is exactly what occurred here when the NCUC enforced the interconnection agreement in question.

Finally, the National Association of Regulatory Utilities Commissioners recently resolved that "reciprocal compensation arrangements, including those for calls to ISPs, are subject to state authority without the need for the FCC to intervene or otherwise act on this

¹ BellSouth's motion is defective in that it may not request a primary jurisdiction referral for the first time on appeal. *Kendra Oil & Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240 (7th Cir. 1998); *Gross Common Carrier, Inc. v. Baxter Helthcare Corp.*, 51 F.3d 703 (7th Cir. 1995). A federal district court in Illinois recently denied a similar request by Ameritech on those grounds.

² *Iowa Utilities Board v. FCC*, 120 F.3d 753, 804(8th Cir. 1997), cert. granted sub nom, *AT&T Corp. v. FCC*, 118 S.Ct. 879 (1998).

³ *Id.*

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matter."⁴ It is also evident that to the extent the Commission needs to address the jurisdictional nature of local calls to ISPs, it does not need a primary jurisdiction referral, or any other action by the District Court, in order to do so.⁵

For these reasons, we respectfully request that the Commission take no action with respect to BellSouth's motion for primary jurisdiction referral. In particular, we are concerned that any filing with the court by the Commission, other than an opposition, could be interpreted as support for the BellSouth motion. Accordingly, US LEC respectfully requests that the Commission decline to participate in any respect in this matter before the United States District Court for the Western District of North Carolina.

Sincerely,



Richard M. Rindler
Patrick J. Donovan

cc: Commissioners and Legal Assistants
Christopher J. Wright
John E. Ingle
Kathryn Brown
Kathryn Schroder
Tamara Preiss
Edward Krachmer
Magalie Roman Salas, Secretary

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⁴ *Reciprocal Compensation for Calls to ISPs*, Resolution, NARUC Summer 1998 Meeting, <<http://www.naruc.org/Resolutions/summer98.htm>>.

⁵ *In the Matter of GTOC Tariff No. 1* (Order Designating Issues for Investigation), CC Docket No. 98-79, DA 98-1667, released August 20, 1998.